

WCA Rule Advisory Committee - 3/27/08 Meeting

Draft Sequencing Section

8420.0520 SEQUENCING STANDARDS

Subpart 1. **Requirement.** The local government unit may not consider or approve a wetland replacement plan unless the local government unit finds that the applicant has demonstrated that the activity impacting a wetland ~~has complied with part 8420.0400, subpart 2 of the application requirements~~ and with all of the following principles in descending order of priority:

A. avoids direct or indirect impacts ~~to the wetland~~ that may destroy or diminish the wetland under the criteria in subpart 3;

B. minimizes ~~the impacts to the wetland~~ by limiting the degree or magnitude of the wetland activity and its implementation under the criteria in subpart 4;

C. rectifies ~~the impacts~~ by repairing, rehabilitating, or restoring the affected wetland under the criteria in subpart 5;

D. reduces or eliminates the impacts to the wetland over time by implementing preservation and maintenance operations under the criteria in subpart 6; and

E. replaces unavoidable impacts ~~to the wetland~~ by restoring or, if wetland restoration opportunities are not reasonably available, creating substitute replacement wetland areas having equal or greater function and public value as provided for in parts 8420.0530 to 8420.0760.

Exceptions to this part include wetlands located in cultivated fields that are subject to subpart 8, and calcareous fens that are subject to subpart 9.

Subp. 2. **Application options.** ~~An applicant may either submit the information required for sequencing analysis as part of a replacement plan application or apply for a preliminary sequencing determination from the local government unit before preparing a replacement plan. The local government unit may request additional information needed to make a determination. For projects impacting greater than 10,000 square feet, the applicant must provide written documentation of the project's compliance with the sequencing requirements of Subpart 1. For projects impacting wetland areas less than 10,000 square feet more than the de minimis amount listed in part 8420.0122, subpart 9, item A, the local government unit may provide an on-site sequencing determination without written documentation from the applicant. The applicant must provide the information necessary to make a sequencing determination to the local government unit.~~

The top half of the paragraph (in gray) is proposed to be relocated to the Applications Section and edited there. The remainder of the paragraph includes edits and added language to simplify and clarify when an on-site sequencing determination can be made and to emphasize that the applicant is required to provide the necessary information to the LGU. Existing language is unclear and provides a multitude of thresholds where on-site sequencing could apply. A single standard for all projects statewide is viewed as a simplification step and will be easier to understand and implement.

Subp. 3. **Determination of ~~i~~mpact avoidance.**

A. Avoidance ~~must be~~ is required when indicated by part 8420.~~0548~~0400 Subpart 2.

B. Wetland dependence determination:

(1) Based on information provided by the applicant, the local government unit shall determine if the proposed project is wetland dependent. A project is wetland dependent if wetland features, functions, or values are essential to fulfill the basic purpose of the project. A wetland present at the site of a proposed project does not make that project wetland dependent.

(2) A project that has been determined by the local government unit to be wetland dependent is exempt from the analysis of avoidance alternatives in item C.

C. Alternatives analysis:

(1) ~~In addition to the proposed project, the applicant shall~~must provide the local government unit with documentation describing at least two alternatives, one of which may be the no-build alternative, in addition to the proposed project to that avoid wetland impacts. ~~One may be the no-build alternative, that would avoid impacts to wetlands.~~ For projects that repair or rehabilitate existing infrastructure, only at least one alternative is required. The alternatives may include consideration of alternate sites or alternative project configurations on the proposed site. The alternatives must be judged by the local government unit as good faith efforts, or the local government unit may require the applicant to redraft them for reconsideration.

This paragraph was reworded for clarity. In the third sentence, "only" was changed to "at least" to clarify that the LGU could require more than one alternative in some instances and to be consistent with other existing rule language which gives the LGU the ability to request additional information, require redrafting of alternatives, consider alternative sites, etc.

(2) The local government unit shall determine whether any proposed feasible and prudent alternatives are available that would avoid impacts to wetlands. An alternative shall be considered feasible and prudent if it meets all of the following requirements:

- (a) it is capable of being done from an engineering point of view;
- (b) it is in accordance with accepted engineering standards and practices;
- (c) it is consistent with reasonable requirements of the public health, safety, and welfare;
- (d) it is an environmentally preferable alternative based on a review of social, economic, and environmental impacts; and
- (e) it would create no truly unusual problems.

~~(3) For projects proposing impacts to shallow marsh, type 3, 4, or 5 wetlands, the local government unit shall also determine that there are no environmentally preferable alternatives that would avoid the impact.~~

This item is proposed for relocation to the end of this subpart and edited there.

(43) The local government unit shall consider the following in evaluating avoidance alternatives:

(a) whether the basic project purpose can be reasonably accomplished using one or more other sites in the same general area that would avoid wetland impacts. An alternate site may not be excluded from consideration only because it includes or requires an area not owned by the applicant that could reasonably be obtained, used, expanded, or managed to fulfill the basic purpose of the proposed project;

(b) the general suitability of the project site and alternate sites considered by the applicant to achieve the purpose of the project;

The edits above are intended to clarify that the LGU should consider the suitability of the project site in addition to any alternative sites to achieve the purpose of the project.

(c) whether reasonable modification of the size, scope, configuration, or density of the project would avoid impacts to wetlands;

(d) efforts by the applicant to accommodate or remove constraints on alternatives imposed by zoning standards or infrastructure, including requests for conditional use permits, variances, or planned unit developments; ~~and~~

(e) the physical, economic, and demographic requirements of the project. Economic considerations alone do not make an alternative not feasible and prudent; ~~and~~

~~(f) the amount, distribution, condition and value of wetlands and other resources on the site and the potential for direct and indirect impacts to wetland functions and values over time;~~

The above changes address site suitability and the effect of indirect impacts that may occur to avoided wetlands that remain.

(45) If the local government unit determines that a feasible and prudent alternative exists that would avoid impacts to wetlands, it shall deny the replacement plan. If no feasible and prudent alternative is available that would avoid impacts to wetlands, the local government unit shall evaluate the replacement plan for compliance with subparts 4 to 8.

(53) For projects proposing impacts to ~~shallow marsh, deep marsh, and shallow open water type 3, 4, or 5 public waters~~ wetlands ~~where jurisdiction has been waived to the local government unit~~, the local government unit shall also determine that there are no environmentally preferable alternatives that would avoid the impact.

This item was considered for elimination to provide a consistent standard for all wetland types and for simplification. Rather than eliminate it, it was edited to apply to instances when the DNR waives jurisdiction to a WCA LGU, which relates directly to the original purpose of the language. BWSR staff will research and explore the feasibility of this potential language change further as the rulemaking process continues. It is included here for review and comment from the Advisory Committee.

Subp. 4. ~~Determination of i~~Impact minimization.

~~A. The applicant shall demonstrate to the local government unit's satisfaction that the activity will minimize impacts to wetlands.~~ In reviewing the sufficiency of the applicant's ~~efforts~~ proposal to minimize wetland impacts, the local government unit must consider all of the following:

The first sentence (in gray) is proposed to be relocated to the application section, applicable to all sequencing steps, and stated once.

- (1) the spatial requirements of the project;
- (2) the location of existing structural or natural features that may dictate the placement or configuration of the project;
- (3) the purpose of the project and how the purpose relates to placement, configuration, or density;
- (4) the sensitivity of the site design to the natural features of the site, including topography, hydrology, and existing vegetation;
- (5) the value, function, and spatial distribution of the wetlands on the site;

(6) individual, ~~and~~ cumulative, ~~and indirect~~ impacts ~~and degradation of remaining wetlands~~; and

This was added to clarify that cumulative and indirect impacts of wetlands that could occur after project completion due to inadequate design or lack of best management practices should be considered and minimized to the extent possible.

(7) an applicant's efforts to:

- (a) modify the size, scope, configuration, or density of the project;
- (b) remove or accommodate site constraints including zoning, infrastructure, access, or natural features;
- (c) confine impacts to the fringe or periphery of the wetland; and
- (d) otherwise minimize impacts.

~~—B. If the local government unit finds that an applicant has not complied with the requirements to minimize wetland impacts, the local government unit shall list, in writing, its objections to the project. If, within 30 days, the applicant does not withdraw the project proposal or indicate intent to submit an amended project proposal satisfying the local government unit's objections, the statement of objections shall constitute a denial.~~

This section is proposed to be removed and addressed in the noticing section and treated the same as other types of applications. Sequencing determinations done in conjunction with a replacement plan will be evaluated as part of the regular replacement plan review.

Subp. 5. ~~Determination of impact~~ **rectification.** Temporary impacts ~~to a wetland~~ must be rectified by repairing, rehabilitating, or restoring the affected wetland in accordance with part 8420.0600.

~~—A. Activities may qualify for a no-loss determination in part 8420.0220 by meeting all of the following conditions:~~

~~—(1) the physical characteristics of the affected wetland, including ground elevations, contours, inlet dimensions, outlet dimensions, substrate, and hydrologic regime, are restored to preproject conditions sufficient to ensure that all preproject functions and values are restored;~~

~~—(2) the activity is completed and the physical characteristics of the wetland are restored within six months of the start of the activity; and~~

~~—(3) the party responsible for the activity provides a performance bond to the local government unit for an amount sufficient to cover the estimated cost to restore the wetland to preproject conditions. The local government unit shall return the performance bond to the responsible party upon a determination by the local government unit that the conditions in this item and item B have been met.~~

~~—B. An applicant shall be granted a no-loss determination under the criteria in item A once in a ten-year period for a particular site within a wetland, except that repairs to the original project shall be allowed under the no-loss determination, if the local government unit determines the request to be necessary and reasonable.~~

~~—C. Wetland impacts that do not qualify for a no-loss determination according to the criteria in item A are subject to replacement under the criteria in parts 8420.0530 to 8420.0630.~~

The body of Subpart 5 describes criteria for a no-loss, so it is proposed for relocation to the no-loss section (8420.0600) with a reference to that section provided here.

Subp. 6. **Determination of reduction or elimination of impacts over time.** After an activity is completed, further wetland impacts from the draining or filling must be reduced or eliminated by maintaining, operating, and managing the project in a manner that preserves and maintains remaining wetland functions and values. The local government unit must require applicants to implement best management practices to protect wetland functions and values.

Subp. 7. **Unavoidable impacts.** Unavoidable ~~wetland~~ impacts that remain after efforts to minimize, rectify, or reduce or eliminate them must be replaced according to parts [8420.0530](#) to [8420.0630](#).

NOTE: The following three options were considered regarding Sequencing Flexibility:

- 1. Eliminate sequencing flexibility with item B(3) incorporated into avoidance.**
- 2. Incorporate sequencing flexibility concepts into standard sequencing considerations.**
- 3. Use existing sequencing flexibility language but clarify its use and applicability.**

The Technical Committee recommended the sequencing flexibility language remain in the rule with some edits. This recommendation resulted in the language below. An alternative format for the language was also discussed, but has not yet been developed. If alternative language is developed, it will be presented to the Technical and Advisory Committees for review and comment.

Subp. **87a. Sequencing flexibility.**

A. ~~Sequencing flexibility~~ in the order and application of sequencing standards cannot be implemented unless alternatives have been considered and unless the proposed replacement wetland is certain to provide equal or greater functions and public values as determined based on a functional assessment reviewed by the technical evaluation panel using a methodology approved by the board. The project sponsor must provide the necessary information and the local government unit must document the application of sequencing flexibility in the replacement plan approval.

The first sentence was edited to clarify what sequencing flexibility actually means.

B. Flexibility in application of sequencing steps may be applied, subject to the conditions above, as determined by the local government unit if

(1) the wetland to be impacted has been degraded to the point where replacement of it would result in a certain gain in function and public value;

(2) preservation of a wetland would result in severe degradation of the wetland's ability to function and provide public values, for example, because of surrounding land uses and the wetland's ability to function and provide public values cannot reasonably be maintained through implementation of best management practices, ~~other~~ land use controls, or other mechanisms;

The edits above are added to emphasize that a lack of appropriate BMP's should not be used as justification for sequencing flexibility.

(3) the only feasible and prudent upland site available for the project or wetland-replacement ~~or development~~ has greater ecosystem function and public value than the wetland. ~~Although this is a rare circumstance since there will usually be several options for siting the replacement wetland or development, This~~ it may be appropriate only if the ~~project sponsor~~ applicant:

The above edits are intended to provide clearer language and remove unnecessary editorial.

- (a) demonstrates impact minimization to the wetland;
- (b) agrees to perpetually preserve the designated upland site; and
- (c) completely replaces the impacted wetland's functions and public values; or
- (4) the wetland is a site where human health and safety is a factor.

Subp. ~~89~~. **Wetlands on cultivated fields.** If the wetland is located on a cultivated field and will be replaced through restoration, then the priority order for sequencing in subpart 1 is not required. A wetland ~~drained or filled~~impacted under this provision must not be converted to nonagricultural land for ten years. The landowner must execute and record a notice of this requirement in the office of the county recorder for the county in which the property is located.

~~—Subp. 910. **Calcareous fens.** Calcareous fens, as identified by the commissioner, may not be filled, drained, impacted, or otherwise degraded, wholly or partially, by any action, unless the commissioner, under an approved management plan, decides some alteration is necessary, as provided in part 8420.1010.~~

This section is proposed to be removed as it is covered in Scope. WCA does not regulate calcareous fens.

STAT AUTH: MS s [14.06](#); [103B.101](#); [103B.3355](#); [103G.2242](#)

HIST: 18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135

NOTE: The WCA Rule Technical Committee identified some inconsistencies with the language in the Sequencing section. In some cases the language refers to requirements of the applicant, while in other cases the language refers to the local government unit's determination. The Technical Committee recommended the BWSR staff investigate the possibility of developing consistent language that describes the standards for sequencing to improve clarity. BWSR staff will be looking into this possibility and, if clearer and more consistent language can be developed that maintains the intent of the requirements, will present the language to the Technical and Advisory Committees for review and comment.